



An
Bord
Pleanála

Inspector's Report ABP-308306-20

Question

Whether a development comprising the change of use from a house to use as residence by persons with an intellectual or physical disability or mental illness is or is not development and is or is not exempted development

Location

Mylerstown, Naas, Co. Kildare

Declaration

Planning Authority

Kildare County Council

Planning Authority Reg. Ref.

ED00799

Applicant for Declaration

David Durney – New Beginnings
Residential & Child Care Services

Planning Authority Decision

Is development and is not exempted
development

Referral

Referred by

David Durney – New Beginnings
Residential & Child Care Services

Owner/ Occupier

Not Stated

Observer(s)

None

Date of Site Inspection

08.12.2020

Inspector

Anthony Kelly

1.0 Introduction

- 1.1. This is a referral by David Durney, director of New Beginnings Residential & Child Care Services. The referral relates to *'whether a development comprising the change of use from a house to use as residence by persons with an intellectual or physical disability or mental illness at Mylerstown, Naas, Co. Kildare is or is not development and is or is not exempted development.* Kildare County Council issued a Declaration stating the development is development and is not exempted development.
- 1.2. The purpose of this referral is not to determine the acceptability or otherwise of the change of use from a house to use as a residence by persons with an intellectual or physical disability or mental illness in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development, and if so, falls within the scope of exempted development.

2.0 Site Location and Description

- 2.1. The site is located approx. 1km east of Two Mile House and approx. 3km south of Naas in eastern Co. Kildare.
- 2.2. The site is occupied by a single storey house. It is the last in a line of houses on the north side of the local road. There is agricultural land to the north and east. It is in a 60kph speed limit area.

3.0 The Question

- 3.1. There does not appear to have been a specific question posed by the applicant in the application to Kildare County Council. The Council's Declaration cites the following question:

Whether a development comprising the change of use from a house to use as residence by persons with an intellectual or physical disability or mental illness at Mylerstown, Naas, Co. Kildare is or is not development and is or is not exempted development.

3.2. In correspondence with the Board, the applicant states that the original question put to Kildare County Council was:

Whether a development comprising the change of use from a house to use as a residence by persons with an intellectual disability or mental illness at Mylerstown, Naas, Co. Kildare; approximately 1.5km east of the village of Two-Mile-House, is exempted development.

3.3. Having regard to the documentation on file, I consider that the wording used by the Council in its Declaration is appropriate. The question considered is therefore as per the Council Declaration:

Whether a development comprising the change of use from a house to use as residence by persons with an intellectual or physical disability or mental illness at Mylerstown, Naas, Co. Kildare is or is not development and is or is not exempted development.

4.0 Planning Authority Declaration

4.1. Declaration

4.1.1. The Declaration issued by Kildare County Council concluded:

(a) Change of use from house to use as a residential centre for children, the residence will provide for 4 residents and 2 residential carers, constitutes development as defined by Section 3(1) of the Planning and Development Act 2000 (as amended).

(b) This development falls within the parameters of Class 14(f) of Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended), but is not exempted development under restrictions on exemptions imposed by Article 9(1)(a)(viii) which states;

“Development to which article 6 relates shall not be exempted development for the purposes of the Act –

(a) If the carrying out of such development would –

(viii) consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use.

This development is therefore not exempted development as defined by the Planning and Development Act 2000 (as amended) and the Planning and Development Regulations 2001 (as amended) as the Applicant has failed to adequately demonstrate that the existing dwelling is an authorised structure.

4.2. Planning Authority Reports

- 4.2.1. Two Planning Reports form the basis for the County Council's Declaration. The Council sought further information requesting details of the planning history to ensure that the house on site is authorised and that the proposed development is not restricted having regard to article 9(1)(a)(viii) of the Planning & Development Regulations, 2001 (as amended). Article 9(1) relates to restrictions on exemptions. Upon receipt of the further information response, the County Council considered that it had not been adequately demonstrated that the house is authorised and on that basis the Declaration was issued.

5.0 Planning History

5.1. On Site

- 5.1.1. P.A. Reg. Ref. 98/1884 – Permission was granted in 1999 for a bungalow, garage and septic tank.

5.2. Relevant Referrals

- 5.2.1. There are a number of decisions by the Board which are relevant, and these have been considered in this report:

ABP Reg. Ref. 09.RL.3554 – In 2019 the Board decided that the use of a residence by up to six persons with an intellectual or physical disability or mental illness together with up to two resident carers at Rathbane, Killeel, Co. Kildare is not development.

ABP Reg. Ref. 15.RL.3463 – In 2016 the Board decided that the change of use of a house to use as a residence for persons with intellectual/physical disability or mental

illness and persons providing care for such persons at Hampton Lodge, Tullydonnell, Dunleer, Co. Louth is development and is exempted development.

ABP Reg. Ref. 06D.RL.3304 – In 2015 the Board decided that the proposed change of use of 19 permanent residential units to a supported housing scheme for persons with mental illness at Carrickmines Manor, Glenamuck Road, Carrickmines, Dublin is not development.

ABP Reg. Ref. 25.RL.3060 – In 2013 the Board decided that the change of use from domestic dwelling to residential use as a residence for five persons with intellectual disabilities at Coralstown, Killucan, Co. Westmeath is development and is exempted development. There was also an issue in this referral relating to the partial repair of a defective section of the house.

ABP Reg. Ref. 06D.RL.2616 – In 2009 the Board decided that the change of use of a single dwelling to a residential care unit for persons with intellectual, physical disability or mental illness and persons providing care at 59A Kerrymount Rise, Foxrock, Dublin is development and is exempted development.

ABP Reg. Ref. 18.RL.2552 – In 2009 the Board decided that the change of use of a dwellinghouse to a childcare facility at Drumbenagh, Co. Monaghan is not development.

6.0 Policy Context

6.1. Kildare County Development Plan 2017-2023

6.1.1. The site is located outside of any zoned area.

6.2. Natural Heritage Designations

6.2.1. The closest Natura 2000 site is Mouds Bog SAC approx. 8.2km to the north west. The closest heritage area is Grand Canal pNHA approx. 3.6km to the west.

7.0 The Referral

7.1. Referrer's Case

The main points made by the referrer, David Durney, can be summarised as follows:

- The Council requested further information as to whether the existing house is in compliance with the original planning permission granted in November 1999. The intent of the letter was unclear, but a report was submitted in response confirming that the wastewater treatment system installed was in good working condition. An old timber shed on site was removed. The referrer is satisfied that the property is in compliance with the original planning permission.
- Schedule 2 Part 1 Class 14(f) of the Planning & Development Regulations, 2001 (as amended) applies. The referrer is satisfied that restrictions on exemption in article 9 (1)(a) do not apply in this case.
- A profile of New Beginnings Residential & Child Care Services Ltd. is provided. It was established in 2007 and provides residential childcare to vulnerable children and young people in the care of the State. It provides long-term care interventions for children and young people with intellectual and mental health difficulties. Due to demand the company has decided to open a second service in the Kildare area.

7.2. Planning Authority Response

The main points made can be summarised as follows:

- The proposed development was considered development under section 3(1) of the Planning & Development Act, 2000 (as amended). The legislation provides for a change of use as proposed having regard to article 6 and Schedule 2 Part 1 Class 14(f) of the Planning & Development Regulations, 2001 (as amended). However, to ensure no conflict with article 9 (1)(a)(i) of the Regulations, it had to be established that the existing house and associated garages were authorised. A relevant parent permission could not be identified. Therefore, further information was sought to clarify whether the house and garages on site were authorised.

- The further information response failed to identify any previous permission. Therefore, the Declaration was issued that the development was development and was not exempted development.
- Following receipt of the appeal another search was conducted and P.A. Reg. Ref. 98/1884 relating to the site was identified. This clarifies that the development is authorised. It is noted the appeal documentation does not provide detail of this permission.
- Kildare County Council considers the proposed development to be development and also exempted development and requests the Board to overturn the original decision.

7.3. **Owner/Occupier's response**

7.3.1. None.

7.4. **Further Responses**

7.4.1. None sought.

8.0 **Statutory Provisions**

8.1. **Planning and Development Act, 2000 (as amended)**

8.1.1. Section 3(1)

'In this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land'.

8.2. **Planning and Development Regulations, 2001 (as amended)**

8.2.1. Article 6(1)

'Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such

development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1’.

8.2.2. Article 9(1)

This article sets out restrictions on exemption to which article 6 relates e.g. if the carrying out of such development would contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act (subsection (a)(i)), endanger public safety by reason of traffic hazard or obstruction of road users (subsection (a)(iii)) or consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use (subsection (a)(viii)).

Schedule 2 Part 1 Class 14 (f)

Part 1

Exempted Development - General

Column 1 Description of Development	Column 2 Conditions and Limitations
<p><i>Change of use</i></p> <p>CLASS 14</p> <p>Development consisting of a change of use – (f) from use as a house, to use as a residence for persons with an intellectual or physical disability or mental illness and persons providing care for such persons.</p>	<p>The number of persons with an intellectual or physical disability or a mental illness living in any such residence shall not exceed 6 and the number of resident carers shall not exceed 2.</p>

9.0 **Assessment**

- 9.1. The referrer sought a declaration from Kildare County Council as to whether the change of use from a house to use as a residence by persons with an intellectual disability or mental illness was exempted development. The cover letter submitted with the application states that the home is to meet the needs of young people in the care of the Child & Family Agency. Four children of mixed gender up to the age of 18 can be accommodated with lengths of stay variable. A maximum of two resident carers shall be in the residence. The cover letter specifically states that 'young people with an intellectual or physical disability or mental illness requiring care, attention or therapy only are referred and processed for admission to our service. The level of emotional and psychological need has, in the main, resulted in these young people being psychologically assessed as having an intellectual disability and/or a mental illness'.
- 9.2. Kildare County Council was not satisfied that the restriction on exemption set out under Article 9(1)(a)(viii) i.e. consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use, did not apply as there was no apparent record of a planning permission on site. Its subsequent Declaration that the development was not exempted development was based on this. However, in their response to the referral, the Council states that, following an additional search, P.A. Reg. Ref. 98/1884 applies to the site and had this been known at the time, the Council would have considered the development to be development and also exempted development.
- 9.3. The issues for the Board to consider are whether the proposal comprises development, whether or not it is exempted development and, if considered to be exempt, whether or not there any restrictions that would de-exempt the development. These issues are considered below.

Is or is not development

- 9.4. Section 3 of the Planning & Development Act, 2000 (as amended) defines development as the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land. In this case there are no works proposed, so the issue is whether or not an actual change of use would occur and whether that would be a material change of use.

9.5. The Council considered the development to be 'development' and this is not disputed by the referrer. I also consider the development to comprise 'development' for the purpose of the Act. I consider that the presence of care workers and the need for continual support for the resident children falls outside the normal understanding of the occupation of a house. Having regard to the need for, and pattern of care, attention and therapy being provided, presumably by professional care workers who would form a necessary part of the service, I consider it would be, essentially, an institutional type of use on a very limited scale. I consider that it would comprise development and would be a material change of use of the structure. This conclusion is supported by ABP Reg. Ref. 15.RL.3463 (Dunleer, Co. Louth 2016).

Is or is not exempted development

9.6. Schedule 2 Part 1 Class 14(f) states that a change of use from use as a house, to use as a residence for persons with an intellectual or physical disability or mental illness and persons providing care for such persons is exempted development as provided for in article 6(1). The only condition and limitation set out for Class 14(f) is that the number of persons with an intellectual or physical disability or a mental illness living in any such residence shall not exceed 6 and the number of resident carers shall not exceed 2.

9.7. The documentation submitted with the application clearly indicates that the future residents of the house would comply with the persons referenced in Class 14(f). The cover letter states that residents would be young people under the age 18 with an intellectual or physical disability or mental illness requiring care, attention and therapy. The Class does not distinguish between children or adults. The conditions and limitations are met, as there will be a maximum of four residents and two resident carers.

9.8. I consider that, based on the documentation submitted with the application, the proposed use of the house would be of a type consistent with and allowed for under Class 14(f). The Board has previously decided that similar proposals were exempt under Class 14(f) e.g. 15.RL.3463 (Dunleer, Co. Louth 2016), 25.RL.3060 (Killucan, Co. Westmeath 2013) and 06D.RL.2616 (Foxrock, Co. Dublin 2009).

Restrictions on exempted development

- 9.9. Article 9 de-exempts various development that would otherwise be exempt under article 6. In its Declaration, Kildare County Council considered that the development was not exempt because article 9(1)(a)(viii) refers to development which would consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use. However, the Council states in its response to the referral that the house was constructed on foot of P.A. Reg. Ref. 98/1884, and it no longer considers this subsection to be applicable. I consider there are no conditions attached to the grant of permission that would de-exempt the development under article 9(1)(a)(i) i.e. contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.
- 9.10. Having regard to the other circumstances in which development is de-exempted, I do not consider any to be relevant to this referral.

Conclusion

- 9.11. Having regard to the foregoing, I consider that the proposed development would comprise a material change in the use of the structure. However, I consider the use is exempt as per Class 14(f) of Schedule 2 Part 1 of the Planning & Development Regulations, 2001 (as amended). I also do not consider there are any restrictions on this exemption. Therefore, I consider the proposal would comprise development and exempt development.

10.0 Appropriate Assessment

- 10.1. Having regard to the nature and scale of the development which is the subject of this referral and its location relative to Natura 2000 sites, no appropriate assessment issues arise and it is not considered that the development would be likely to have a significant effect either individually or in combination with other plans or projects on a European site.

11.0 Recommendation

I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether a development comprising the change of use from a house to use as residence by persons with an intellectual or physical disability or mental illness at Mylerstown, Naas, Co. Kildare is or is not development and is or is not exempted development:

AND WHEREAS David Durney requested a declaration on this question from Kildare County Council and the Council issued a declaration on the 4th day of September, 2020 stating that the matter was development and was not exempted development:

AND WHEREAS David Durney referred this declaration for review to An Bord Pleanála on the 30th day of September, 2020:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 3(1) of the Planning and Development Act, 2000,
- (b) Article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (c) Schedule 2 Part 1 Class 14(f) of the Planning and Development Regulations, 2001, as amended,
- (d) The nature and scale of the proposed use as a residence for young persons with an intellectual or physical disability or mental illness requiring care, attention or therapy.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The change of use of a house to use as a residence by persons with an intellectual or physical disability or mental illness constitutes a material change of use, and is therefore development, as defined in section 3 of the Planning and Development Act 2000, as amended,
- (b) This change of use comes within the scope of Class 14(f) of Part 1 of Schedule 2 of the Planning and Development Regulations 2001, as amended, and,
- (c) None of the restrictions on exemption set out in article 9(1) of these Regulations apply in this instance.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5(3)(a) of the 2000 Act, hereby decides that the change of use from a house to use as residence by persons with an intellectual or physical disability or mental illness at Mylerstown, Naas, Co. Kildare is development and is exempted development.

Anthony Kelly

Planning Inspector

28.01.2021